IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

Crl.Rev.Pet.No. 4240 of 2007()

CRRP.8/2005 of SESSIONS COURT, KASARAGOD.
M.C. NO. 65/2003 of SUB DIVISIONAL MAGISTRATE, KASARAGOD.

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REVN. PETITIONER:

P. MADHAVAN NAIR, S/O. P. KUNHIRAMAN NAIR,
RESIDING AT MALANKAD, BADIADKA VILLAGE,
KASARAGOD TALUK, P.O. KUNDAMKUZHI.

BY ADV. SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

RESPONDENTS:

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1. KUNHAMMA, W/O. UMBUNGAN, RESIDING AT MALANKAD,
   BADIADKA VILLAGE, KASARAGOD TALUK AND DISTRICT,
   P.O. KUNDAMKUZHI.

2. M. KRISHNAN, S/O. T.KANNAN, RESIDING AT MALANDAD,
   BADIADKA VILLAGE, KASARAGOD TALUK,
   P.O. KUNDAMKUZHI.

3. THE STATE OF KERALA REPRESENTED BY THE PUBLIC
   PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI. C.M. NAZAR, PUBLIC PROSECUTOR
SRI.M.SASINDRAN

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 27/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR , J

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CRL.R.P. NO. 4240 of 2007

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Dated this the 27th day of November, 2007.

ORDER

The revision petitioner, who was the 1st applicant before the Sub Divisional Magistrate, Kozhikode in M.C. No. 65/2003 alleging inundation of water in his property on account of the obstruction to the road allegedly caused by the counter petitioner therein, challenges the revisional order passed by the Sessions Court, Kasaragod in Crl.R.P. No. 8/2005. The learned Sessions Judge set aside the order passed by the Sub Divisional Magistrate for the reason that no enquiry was conducted under Section 137 Cr.P.C or evidence was recorded under Section 138 Cr.P.C before making the conditional order absolute.

2. The 2nd respondent herein, who was the counter petitioner before the Sub Divisional Magistrate, on receipt of the conditional order passed under Section 133 Cr.P.C., appeared and filed objections disputing the public nature of the alleged way and he also filed objection against the conditional order being made absolute. If the opposite party appears and files objections, the Magistrate should not dispose of the case under Section 136 Cr.P.C but should take evidence and satisfy himself that the order passed by him is reasonable and proper. Even in cases where the opposite party does not pursue his or her objections, the complainant should lead evidence on his side and

should not leave the Magistrate to base his order on the materials placed before him when the preliminary order was passed. Report of the Tahsildar, police or evidence adduced while passing order under Section 133 etc. are not substitutes for taking of evidence under Section 138 Cr.P.C (See 1974 KLT 591) Even when the opposite party who denies the alleged right or alleged public nuisance fails to appear at a subsequent stage, the Magistrate cannot make the conditional order absolute without taking evidence on behalf of the complainant (See 1968 KLT 889- **Ittiathikunjan v. Lakshmikuttiamma** and 1961 KLT 617- **Ambi v. State of Kerala**, **Sankaran v. Kunjukrishnan.**) The burden of proof in an enquiry under Section 138 is on the party at whose instance the proceedings were initiated (1966 KLT 1100-**Balan v. State of Kerala.**) It was in violation of the procedural formalities that the Sub Divisional Magistrate made the conditional order absolute. The Sessions Judge has rightly set aside the final order passed in violation of the procedure established by law. The matter was remitted to the Sub Divisional Magistrate for proceeding in accordance with law. I see no reason to interfere with the revisional order passed by the Sessions Judge. This revision is accordingly dismissed.

V. RAMKUMAR, JUDGE.